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No.

In the Supreme Court of the United States

October Term, 1980

LARRY W. ABRAMS,
Petitioner,

vs.

MISSISSIPPI STATE BOARD OF HEALTH, ALTON B. COBB AND WILFRED Q. COLE, Individually and in Their Official Capacities as Members of the Mississippi State Board of Health, Their Agents, Employees, Successors and All Other Persons Acting in Concert With Them; VAN PHILPOT and EDWARD GORE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does action taken by a state agency against his private employer violate procedural due process and the protection of liberty in the Fourteenth Amendment to the United States Constitution when solely as a result a citizen is rendered unemployable without a hearing or opportunity to clear his name?

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PROCEEDINGS BELOW

Petitioner brought this due process action under 42 U.S.C. §1983, for injunctive relief and damages. The proceedings below:

1. On June 5, 1980, United States District Judge for the Northern District of Mississippi, L. T. Senter, Jr., ordered that defendants' Motion for Summary Judgment be granted and the cause be dismissed with prejudice.

2. On March 6, 1981, the United States Court of Appeals for the Fifth Circuit affirmed the order of the

District Court without opinion, on the basis of the lower court's order.

3. On March 31, 1981, the United States Court of Appeals for the Fifth Circuit denied the petition for panel rehearing, without opinion.

JURISDICTION

This Court has jurisdiction to review the Order of the United States Court of Appeals for the Fifth Circuit, entered March 31, 1981, which denied the petition for rehearing via *certiorari*, pursuant to the provisions of 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

1. The due process clause of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

1. Civil Rights Act of 1871; Title 42, U.S.C. §1983.

STATEMENT OF THE CASE

I. Introduction.

Petitioner, Abrams, is a physician's assistant formerly employed by a practicing physician in Houston, Mississippi. The training and development of the physician's assistant's skills have been pursued by Abrams beginning with service as a corpsman in the Viet Nam conflict through academic training at the University of South Alabama, and as a practicing physician's assistant for nearly a decade in the rural community of Houston, Mississippi.

In 1979, petitioner's employer-preceptor was charged by the Mississippi State Board of Health (State Board) with the aiding and abetting of petitioner in the unlicensed and unauthorized practice of medicine. At no time at the administrative proceeding which concerned his employer's actions was petitioner given any opportunity to contest the allegations as they related to him. (The physician contested the allegations against him and since known by him Abrams has denied any wrongdoing raised by the allegations and conclusions of the State Board.) The order issued by the State Board specifically named petitioner, Larry Abrams, as the person engaged in the unlicensed practice of medicine. The order further stated that Abrams' employer could either fire Abrams and retain his license to practice medicine, or he would face loss of his license under a three year suspension. Dr. John D. Dyer, Abrams' employer-preceptor, was thus forced to fire Abrams under the duress of the State Board's order, action he would not have otherwise taken. It was never disputed that Abrams performed well the duties of a physician's assistant and that he would not have lost his job absent the action of the State Board. This order was subsequently mailed to numerous governmental and health-related agencies throughout the United States:

Drug Enforcement Administration, Jackson, Mississippi, Miami, Florida;

American Medical Association Department of Investigation;

Social Security Administration, Region IV, HEW;

Mississippi State Medical Association;

Mississippi State Board of Pharmacy;

Mississippi Hospital Association;

Mississippi Medicaid Commission;

Mississippi Bureau of Narcotics;

Chickasaw County Circuit Clerk.

Other physicians would not hire Abrams because of the order. By the action of the state agency, petitioner was stigmatized, penalized and egregiously injured because he could no longer find employment as a physician's assistant, his chosen profession.

II. Petitioner's Federal Claims Were Presented at All Stages of the Proceedings Below.

From the outset of the case, petitioner asserted the claim that the actions of the private respondents,[1] in concert with the State Board of Health, have deprived him of his liberty to pursue his chosen profession without due process of law. Suit was brought in the United States District Court, Northern District of Mississippi, Eastern Division, under 28 U.S.C. §1331, providing for actions under 42 U.S.C. §1983. The deprivation without due process of the liberty interest incorporated in the Fourteenth Amendment was raised as a cause of action at each level of the proceedings.

The lower court granted summary judgment by order (and opinion) of the Court on June 5, 1980. The Court relied on the case of *Codd v. Velger*, 429 U.S. 624, 51 L.Ed.2d 92 (1977), holding there must exist some factual dispute between an employer and a discharged employee

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1. Though private defendants moved to dismiss, summary judgment was granted as to all defendants and their involvement was not singled out. Petitioner contends that the intertwining of private action with state action can violate constitutional rights under 42 U.S.C. §1983. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). This, however, is subject to factual development, which underscores the inappropriateness of summary judgment in this case

which has some significant bearing on the employee's reputation in order for there to be an involvement of the due process clause of the Fourteenth Amendment relating to plaintiff's liberty interest. (Page 5 Order of the District Court). The District Court also relied upon plaintiff's deposition, pp. 43-44, concerning plaintiff's actions while in the employ of Dr. Dyer, petitioner's preceptor-employer during the period in question. The Court held that plaintiff's deposition, when considered in conjunction with the statute in Mississippi, §75-25-33, defining the practice of medicine, brought the case within the Supreme Court's holding in *Codd v. Velger, supra.*

Though at all times petitioner Abrams denied any unauthorized practice of medicine, never was he provided a forum to establish his factual innocence. Rather, the State Board of Health tried his employer, but punished Abrams, and the District Court granted summary judgment in the face of serious factual dispute on material questions.

These same federal questions involving the Fourteenth Amendment due process clause and the deprivation of liberty were raised also upon appeal to the court of appeals. The court of appeals without opinion affirmed the summary judgment by the district court, adopting its reasoning.

REASONS FOR GRANTING THE WRIT

By publishing and distributing its order, the State Board managed to preclude the petitioner from freely pursuing his chosen profession. Action was never brought against petitioner herein; instead he was penalized without due process of law, i.e., without notice of the charges or a hearing which confronted him with witnesses or facts. Petitioner, in a sense, was found guilty of a crime,

the unauthorized practice of medicine, without ever having the right to a trial to hear those facts or allegations brought against him. This Court is obliged to review this case, due to the important and special reasons concerning the constitutionally guaranteed right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference.

I. Summary Judgment.

In the face of the genuine issue of material facts, the lower court granted summary judgment. In *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970), this Court held that the lower court erred in granting motion for summary judgment because the moving party failed to carry its burden of showing the absence of any genuine issue of fact. In discussing summary judgment, this Court held:

> "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." 26 L.Ed.2d at 154.

Petitioner urges this Court to review this case due to the fact that summary judgment was erroneously granted below.

A critical aspect of this case was not demonstrated by the respondent and thus, the respondent failed to fulfill its burden of showing absence of any genuine issue of material fact. Abrams was held to have engaged in the unlicensed practice of medicine by the State Board of Health without having opportunity to counter any factual evidence that the State Board of Health might have had.

Other than criminal laws, Mississippi has no statutes which regulate the licensing and practice of a physician's assistant. Admittedly, the State Board of Health has no jurisdiction as a licensing authority over physician's assistants. Physician's assistants throughout the state are regulated and operate within the rules and guidelines set up in the local hospitals in which they work and under the guidance and rules set up by their preceptor-employer physician. Abrams complied with his local hospital rules and followed his employer's application of the rules. Abrams was not given any indication of which standard of conduct the lower court relied on to determine Abrams' violation. The standard of conduct applicable to physician's assistants is a question of material fact which must be determined by means other than summary judgment.

A material fact genuinely in issue here is that despite the lack of factual evidence presented against Abrams, the State Board of Health still managed to preclude Abrams' present and future employment by attacking his employer-preceptor, Dr. Dyer. The gulf is great between the penalty Abrams now suffers and the possible sanctions that could be imposed by his employer or by the local hospital against him for any alleged violations of the local guidelines and the rules for a physician's assistant.

Petitioner urges this Court to grant *certiorari* and reverse and remand this case.

II. The Order of the State Board of Health Violated Petitioner's Right to Hold and Pursue His Chosen Profession As Guaranteed by the Fourteenth Amendment Due Process Clause.

In *Green v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), this Court held the right to hold specific private employment and to follow a chosen pro-

fession, free from unreasonable federal governmental interference, comes within the liberty and property concepts of the Fifth Amendment.

Here a private employee has been grievously injured by state governmental action which denied him the liberty to pursue his chosen profession without due process of law. *Green v. McElroy* was applied by this Court to state action which involved the deprivation of due process rights under the Fourteenth Amendment in *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 10 L.Ed.2d 224, 229, 83 S.Ct. 1175 (1963).

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination *of those whose word deprives a person of his livelihood.*" (Emphasis added)

This Court held in *Willner* that the petitioner was denied procedural due process when he was denied admission to the practice of law by a state committee, because he was given no hearing on the charges filed against him.

The facts of this case are much stronger. Abrams' ability to work as a physician's assistant was permanently injured by action of the state agency with no authority over him, where no charges had been filed, nor were any of the elements of due process recognized under settled law made available to him. Petitioner therefore asks this Court to reaffirm the liberty interest it found in *Green v. McElory* as applied in *Willner v. Committee on Character and Fitness* by granting petitioner's writ for certiorari.

Abrams emphasizes that without due process of law, the injury he has suffered is interminable, and in no way matches the penalty he would have suffered even had he been found guilty of the accusation of the un-

authorized practice of medicine, or even had he been suspended from practicing as a physician's assistant, or even had he been ordered to cease and desist as a physician's assistant by order of the State Board of Health. As it stands, however, petitioner is not able to pursue his livelihood for which he was trained and has worked for nearly a decade, and which has enabled him to become a valuable member of his community.

III. State Action Which Stigmatizes a Private Citizen and Causes His Termination Is a Direct Deprivation of the Liberty Interest in the Fourteenth Amendment and Requires a Due Process Hearing.

This Court held, in *Codd v. Velger*, 429 U.S. 624, 51 L.Ed.2d 92 (1977), that in order to invoke the due process clause of the Fourteenth Amendment in protection of a plaintiff's liberty interest, there must exist some factual dispute between an employer and a discharged employee, which has some significant bearing on the employee's reputation. The Court held that the employee must challenge the substantial proof of the material in question. Otherwise, no hearing would afford a promise of achieving that result for him. Petitioner here has denied in his complaint all allegations of wrongdoing. There has been no hearing where any factual dispute could have been tested.

The Mississippi State Board of Health found that Dr. Dyer, the petitioner's employer, had aided petitioner in the unlicensed and unauthorized practice of medicine, contrary to Mississippi state law. The state agency ordered the suspension of Dr. Dyer's medical license for three years unless he terminated the employment of petitioner herein, Larry Abrams. This order was circulated to the

far reaches of the medical profession, including state and national health-related agencies. The state agency, therefore, not only labeled petitioner as an unauthorized and unlicensed practitioner of medicine, but also stigmatized him within his chosen profession and the community of health care professionals as an unauthorized practitioner.

Other physicians in the Houston, Mississippi, area have been forced to deny petitioner employment as a physician assistant because of the onerous label imposed by the State Board's order. (See Dr. Secrest's affidavit attached as appendix hereto). This Court held in the case of *State of Wisconsin v. Constantineau*, 400 U.S. 433, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971), where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential.

Without opportunity to defend himself, petitioner has been victimized by state action. His only source of employment as a physician's assistant is in connection with a willing physician. Professional ethics and community opinion prevent a physician from hiring a physician's assistant who has been stigmatized as an unlicensed practitioner of medicine. This Court held that where by state action an employee has been stigmatized in the course of a decision to terminate his employment, as in the instant case when Dr. Dyer was forced to terminate petitioner as a result of the order by the State Board of Health, a hearing is required "to provide the person an opportunity to clear his name." *Codd v. Velger, supra.* Again, in *Wisconsin v. Constantineau, supra,* the Court held that only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

This Court is respectfully urged to review this case so that the petitioner may have opportunity to clear his name and continue in his chosen profession which he has trained for and labored in for nearly a decade.

CONCLUSION

For the reasons set forth above, petitioner respectfully prays for issuance of a writ of certiorari to the Supreme Court of the United States, to consider the important federal questions presented together with all subsidiary questions fairly included therein.

Respectfully submitted,

JOHN L. MAXEY, II
(Counsel of Record)
CUPIT & MAXEY
1101 Plaza Building
Post Office Box 22666
Jackson, Mississippi 39205
601/355-1553
Attorneys for Plaintiff-Petitioner

CERTIFICATE

The undersigned, attorney for Petitioner herein, does hereby certify that I have this day caused to be served a true and correct copy of the foregoing Petition for a Writ of Certiorari on the following:

Jim R. Bruce, Esquire
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Jim Waide, Esquire
Post Office Box 1075
West Point, Mississippi 39773

This the 29th day of June, 1981.

JOHN L. MAXEY, II

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION
NO. EC79-279-LS-O

LARRY W. ABRAMS,
Plaintiff,

v.

MISSISSIPPI STATE BOARD OF HEALTH, et al.,
Defendants.

ORDER

The court has before it cross-motions for summary judgment filed on behalf of plaintiff, Larry W. Abrams (Abrams), and defendants, Mississippi State Board of Health (State Board), Drs. Alton Cobb (Cobb) and Wilfred Cole (Cole), members of the State Board's Executive Committee, and Drs. Van Philpot (Philpot) and Edward Gore (Gore). Plaintiff and defendants agree that there exists no genuine issue of material fact. For the reasons set out below, the court finds that the motions for summary judgment filed on behalf of the defendants are well taken and accordingly should be granted. The court is of the opinion that the motion for summary judgment filed on behalf of the plaintiff is not well taken and should be denied.

The undisputed facts gleaned from a review of the pleadings, depositions and other discovery documents on file are as follows. Plaintiff is a physician's assistant or

medex who was employed by Dr. John D. Dyer (a physician not a party to this action) in Houston, Mississippi, from 1971 until October 6, 1979. Abrams performed his duties as physician's assistant to the satisfaction of Dr. Dyer during his entire term of employment. There was no written employment contract governing the relationship between Dr. Dyer and Abrams. Mississippi has not enacted legislation providing for the licensing and regulation of physicians' assistants.

On August 3, 1979, a complaint was lodged with defendant State Board alleging unprofessional conduct on the part of Dr. Dyer and charging Dr. Dyer with having assisted an individual in the unlicensed practice of medicine. Defendants Philpot and Gore participated in the investigation which precipitated the complaint. On August 6, a summons was issued to Dr. Dyer informing him of the charges against him and notifying him of a hearing before the Executive Committee of the State Board scheduled for September 6. On August 9, Dr. Dyer requested that the State Board furnish him a statement of the factual allegations upon which the charges against him were based. In response to his request, a detailed summary of these factual allegations were furnished on August 14. The charges against Dr. Dyer concerned the services he allowed Abrams to render, including Dr. Dyer's furnishing Abrams with a presigned (by Dr. Dyer) prescription pad on which Abrams prescribed controlled substances for patients during Dr. Dyer's absence. A hearing was held on September 6, at which Van Philpot and Gore, among others, testified. On September 7, the Board issued the following order over the signatures of Drs. Cole and Cobb:

> . . . Mississippi Medical License No. 951 issued to John Doyle Dyer, M.D., is suspended for a period of three

> (3) years; provided, however, that the period of suspension is stayed under the conditions that Dr. Dyer terminate the employment of Physician Assistant Larry Abrams within thirty (30) days after his receipt of this Order, that this Board be furnished by registered mail a copy of the correspondence reflecting such termination, and that in the event that Dr. Dyer utilizes the services of any other physician assistant, Dr. Dyer shall do so in conformity with the guidelines adopted by this Board on September 14, 1978. Should Dr. Dyer fail to comply with the above conditions, said three (3) year period of suspension shall become effective immediately. . . .

On September 14, a memorandum regarding this decision was submitted to the following agencies:

> Drug Enforcement Administration: Jackson, Miami
>
> AMA, Department of Investigation
>
> Social Security Administration, Region IV, HEW
>
> Mississippi State Medical Association
>
> Mississippi State Board of Pharmacy
>
> Mississippi Hospital Association
>
> Mississippi Medicade Commission
>
> Mississippi Bureau of Narcotics
>
> Chickasaw County Circuit Clerk.

In compliance with the condition stated in the State Board's order of September 7, Dr. Dyer terminated plaintiff's employment on October 6 and furnished copies of correspondence concerning the termination to the Board, thereby staying his three year suspension.

Plaintiff brings this action pursuant to 42 U.S.C. §1983 alleging that the acts of the State Board violated his right

to procedural due process secured by the Fourteenth Amendment. Plaintiff further charges that defendants Drs. Philpot and Gore, by participating in the investigation which led to Dr. Dyer's hearing are also guilty of acts which violate 42 U.S.C. §1983.

The court is of the opinion that plaintiff's theory must fail.

> [2-5] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.
>
> * * *
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564 at 569, 33 L.Ed. 2d 548 at 556 (1972).

Plaintiff's claim of deprivation of a property interest in his employment secured by the due process clause of the Fourteenth Amendment is belied by the fact that plaintiff had no "legitimate claim to entitlement" to continued employment as Dr. Dyer's physician's assistant. Plaintiff had no written contract of employment, and he was to be employed so long as his performance was satisfactory to Dr. Dyer. Thus, plaintiff's employment was terminable at will, and his termination by Dr. Dyer gave him no right of action against Dr. Dyer under state law. *Rape v. Mobile*

and Ohio Railroad Co., 100 So. 585 (Miss. 1924); *Green v. Amerada Hess Corp.*, 612 F.2d 212 (5 Cir. 1980). Absent this legitimate claim to entitlement to continued employment as a matter of state law, there is no property interest cognizable under the due process clause of the Fourteenth Amendment. *Board of Regents v. Roth*, supra.

As to plaintiff's claim that he has been deprived of a liberty interest in violation of the due process clause of the Fourteenth Amendment, the court has carefully reviewed the cases cited by plaintiff in support of his claim and the court is unable to find that plaintiff's termination from private employment satisfies the "stigma plus" test applicable in this circuit. *Paul v. Davis*, 424 U.S. 693, 47 L.Ed. 2d 405 (1976); *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338 (5 Cir. 1978).

In *Codd v. Velger*, 429 U.S. 624, 51 L.Ed. 2d 92 (1977), the court held, regarding the liberty interest of a policeman discharged because of an alleged suicide gesture during his probationary employment period, that in order to invoke the due process clause of the Fourteenth Amendment in protection of a plaintiff's liberty interest, there must exist some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.

> . . . the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him.

Codd v. Velger, supra. In the case before us, plaintiff complains that the Board's findings indirectly implicate plaintiff in the unauthorized practice of medicine. It is clear,

however, from plaintiff's own deposition at pages 43 to 44 that plaintiff prescribed controlled substances on blank prescription pads presigned by Dr. Dyer. Section 73-25-33, Miss. Code Ann., 1972, provides in pertinent part:

> Practice of Medicine defined.
>
> The practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person, any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity, or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation; provided, that nothing in this section shall apply to females engaged solely in the practice of midwifery.

Plaintiff's deposition, when considered in conjunction with the statutes set out above, brings this case within the Supreme Court's holding in *Codd v. Velger*, supra.

Accordingly, it is

ORDERED:

That defendants' motion for summary judgment is hereby granted.

That plaintiff's motion for summary judgment is hereby denied.

That this cause is hereby dismissed with prejudice. All costs are taxed against plaintiff.

SO ORDERED this 5th day of June, 1980.

/s/ L. T. Senter, Jr.
United States District Judge

(Filed May 29, 1980)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION
CIVIL ACTION NO. EC 79-279-LS-O

LARRY W. ABRAMS,
PLAINTIFF,

v.

MISSISSIPPI STATE BOARD OF HEALTH, ALTON B. COBB and WILFRED Q. COLE, Individually and in Their Official Capacities As Members of the Mississippi State Board of Health, Their Agents, Employees, Successors and All Other Persons Acting in Concert With Them; VAN PHILPOT and EDWARD GORE,
DEFENDANTS.

AFFIDAVIT OF CHARLES SECREST, M.D.

STATE OF MISSISSIPPI
COUNTY OF CHICKASAW

I, CHARLES SECREST, M.D., having been sworn state and depose as follows:

I.

I am an adult resident citizen of Chickasaw County, am a physician licensed to practice medicine in the State of Mississippi, and do maintain a practice limited to internal medicine in Houston, Chickasaw County, Mississippi.

II.

I know Larry W. Abrams and have had the opportunity to observe his practice as a physician assistant to Dr. John

D. Dyer and it is my opinion that Larry W. Abrams has exhibited the skills necessary to perform adequately as a physician assistant or Medex.

III.

During September or October of 1979, Larry W. Abrams came to me and asked me if I would consider hiring him as a physician assistant to work under my supervision. I told him that I was aware of the order of the Mississippi State Board of Health which suspended the license of Dr. John D. Dyer but stayed that order conditioned upon his termination of Larry W. Abrams and as long as that order remained in effect, I would not be willing to consider employing Larry W. Abrams. I further told him that the order raised such serious questions about Larry W. Abrams' relationship with the Mississippi State Board of Health that I believed that employing him under these circumstances might jeopardize my relationship with the Mississippi State Board of Health. That was the sole reason for my refusal to consider his interest in employment.

IV.

I believe that the reasons which make me nervous and reluctant to hire Larry W. Abrams would be those found in many other physicians. A physician's license is so necessary to his ability to earn a living, that very few, if any, physicians would be willing to bring any official scrutiny to that license over the question of employment of a particular employee like Larry W. Abrams. It is simply a matter of the harm to be suffered if a physician's license is jeopardized even though that may be remote when weighed against the advantages of having physician assistants employed, even one as talented as Larry W. Abrams.

This the 27 day of May, 1980.

/s/ Charles Secrest, M.D.
Charles Secrest, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME, this the ..... day of May, 1980.

/s/ (Illegible)
Notary Public

My Commission expires: (Illegible)

(Filed May 29, 1980)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. EC 79-279-LS-O

LARRY W. ABRAMS,
PLAINTIFF,

vs.

MISSISSIPPI STATE BOARD OF HEALTH, ET AL.,
DEFENDANTS.

AFFIDAVIT OF JOHN D. DYER, M.D.

STATE OF MISSISSIPPI
COUNTY OF HINDS:::::

JOHN D. DYER, M.D., having been duly sworn stated and deposed the following:

I.

I am an adult resident citizen of the State of Mississippi and a physician licensed by the State of Mississippi. I have been engaged in the practice of medicine in Houston, Mississippi, under Mississippi Medical License No. 951, since 1940.

II.

During 1971, I employed Larry W. Abrams as a physician's assistant. The terms of Abrams employment with me provided that he would be permanently employed as my physician's assistant as long as he satisfactorily fulfilled the responsibilities and obligations of his job. From his date of employment in 1971, through his date of termina-

tion on October 6, 1979, Larry W. Abrams performed the duties and responsibilities of a physician's assistant competently and satisfactorily.

III.

As a result of action by the Mississippi State Board of Health, my medical license was suspended for a period of three years provided, however, that the period of suspension was to be stayed under the condition that I terminate the employment of Physician's Assistant Larry Abrams within thirty (30) days of September 7, 1979. I terminated Larry W. Abrams from his employment on October 6, 1979. The termination was solely and only for the reason that my license would be suspended for three years, thus rendering me unable to provide many patients in need of medical care with that necessary care. I had no other reason for terminating the employment of Physicians Assistant Larry W. Abrams at that time and would not have terminated him in the absence of the ultimatum from the Mississippi State Board of Health.

IV.

At the time of his termination, Larry W. Abrams was being paid approximately Thirty-Six Hundred Dollars ($3,600.00) per month in salary, plus other employee benefits.

STATED the 4th day of January, 1980.

/s/ John D. Dyer, M.D.
John D. Dyer, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4th day of January, 1980.

/s/ (Illegible)
Notary Public

My Commission Expires: 4/20/80

(Filed May 29, 1980)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. EC 79-279-LS-O

LARRY W. ABRAMS,
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MISSISSIPPI STATE BOARD OF HEALTH, ALTON B. COBB and WILFRED Q. COLE, Individually and in Their Official Capacities As Members of the Mississippi State Board of Health, Their Agents, Employees, Successors and All Other Persons Acting in Concert With Them; VAN PHILPOT and EDWARD GORE,
DEFENDANTS.

AFFIDAVIT OF LARRY W. ABRAMS

STATE OF MISSISSIPPI
COUNTY OF CHICKASAW

I, LARRY W. ABRAMS, having been duly sworn state and depose as follows:

I.

I am an adult resident of Chickasaw County and am the plaintiff in the above styled cause. I have read and understand the allegations of fact in the complaint filed on my behalf in this cause and verify that those matters set out therein are true and correct.

II.

At the time that Dr. John D. Dyer terminated my employment as a physician assistant with him I had just com-

pleted the construction of my home. I had a commitment for permanent financing with Kimbrough Investment Company. As soon as Kimbrough learned of my unemployment, it withdrew its commitment and left me without permanent financing. I am still financing the house on interim financing which is substantially more expensive.

III.

In an effort to survive while unemployed, I have attempted to start a small farming operation which involved dairy cattle. Other than that, I have no employment. Specifically, I have had no employment as a physician assistant, despite my application to Drs. Secrest and Boron and discussions with the Appalachian Regional Council for a position as physician assistant. All of my efforts to gain employment have been unsuccessful when I inform the employer of the circumstances of my termination.

IV.

The attached are copies of excerpts from publications which concern the practice of physician assistants and are published in the due course of the associations' activities.

This the 26 day of May, 1980.

/s/ Larry W. Abrams
Larry W. Abrams

SWORN TO AND SUBSCRIBED BEFORE ME, this the 26th day of May, 1980.

/s/ (Illegible)
Notary Public

My Commission expires: 4-20-81

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No. 81-51

In the Supreme Court of the United States

October Term, 1981

LARRY W. ABRAMS,
Petitioner,

vs.

MISSISSIPPI STATE BOARD OF HEALTH, ALTON B. COBB and WILFRED Q. COLE, Individually and in Their Official Capacities As Members of the Mississippi State Board of Health, Their Agents, Employees, Successors and All Other Persons Acting in Concert With Them; VAN PHILPOT and EDWARD GORE,
Respondents.

BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution of the United States as interpreted by *Alabama v. Pugh*, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), bars the maintenance of an action in federal court against an agency of the state when the state has not consented suit or waived its Eleventh Amendment immunity.
2. Whether the due process clause of the Fourteenth Amendment applies to indirect adverse effects of governmental action taken against a third person in order to protect public health and safety.
3. Whether the action of a state agency violates a liberty of property interest of an individual when by its order it conditions the licensure of a third party on the severance of an employment with the individual.
4. Whether a protected liberty interest is implicated when a state agency determines that an individual has engaged in the unlawful practice of medicine prohibited by state statute, especially when that individual admits that he engaged in such practice.

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STATEMENT OF THE CASE

In response to complaints that a licensed physician, Dr. John D. Dyer, was aiding an unlicensed person in his employment to practice medicine, the Medical Licensure Division of the Mississippi State Board of Health initiated an investigation of alleged activities. The investigation indicated that Dr. Dyer had knowingly permitted his physician assistant to treat patients, to establish the

doctor-patient relationship in his absence and without his supervision, and to prescribe in his absence numerous prescriptions for both controlled substances and legend drugs. Dyer was subsequently summoned to appear at a hearing before the State Board of Health to respond to charges that he had knowingly assisted an unlicensed person to practice medicine contrary to state statute.

Dyer requested and was provided with a statement of all factual allegations and documents which formed the basis for the charges against him. He appeared at the hearing and was represented by counsel during the proceeding. After a full evidentiary hearing, the State Board of Health found Dyer's conduct and activities to be in violation of state law. It entered an order suspending his medical license for three years. The Board further stated in the order that it would stay enforcement of the suspension on the condition that Dyer terminate the employment of his assistant, Larry W. Abrams, and in the future conform his conduct to the guidelines adopted by the Board regarding utilization and supervision of physicians. (R. 89-92). Dyer later terminated the employment of petitioner as his physician assistant.

Following the hearing before the State Board of Health, petitioner submitted a public statement to the newspapers summarizing the actions taken by the State Board of Health and denying any wrongdoing on his part. The statement received front page coverage in the community and in two other cities across Mississippi. At about the same time, the Board issued a memorandum of the disciplinary action it had taken regarding Dyer to seven (7) state and federal drug and health care agencies and the state and national medical associations.

Petitioner filed this action on December 4, 1979, against the Mississippi State Board of Health, two of its officers,

and two private physicians who had testified or provided information in connection with Dyer's licensure hearing. On February 8, 1980, defendants deposed petitioner, and on April 25, 1980, moved for summary judgment based in part on the deposition of petitioner himself. The district court granted defendants' motion and dismissed the action on June 5, 1980. On June 9, 1980, petitioner filed his notice of appeal. On March 6, 1981, the Fifth Circuit Court of Appeals affirmed, without an opinion, the decision of the district court.

REASONS FOR DENYING PETITION

This case involves the existence of a liberty or property interest. The district court fully considered the arguments now advanced by the petitioner. Its analysis is not based upon a new principle of law, but rather the particular facts and circumstances as were before it. Both the district court and the court of appeals correctly applied the controlling precedent of this Court to the particular facts of the case, *i.e., Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); and *Codd v. Velger,* 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977).

There is no departure from precedent of this Court, nor is there a conflict in circuits. Neither will a decision in this case require the court to address new questions of law. Inasmuch as the case was decided on its own special facts, it will have no precedential effect upon other litigants or individual rights. Finally, this case does not reflect other factors frequently relied upon by this Court in determining whether to grant *certiorari, i.e.,* Rule 17.

ARGUMENT

I. The Eleventh Amendment Bars the Present Action Against the Mississippi State Board of Health.

This action against the State Board of Health, which is an arm and agency of the State of Mississippi, is barred by the Eleventh Amendment. In *Alabama v. Pugh*, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), plaintiffs brought an action against the State of Alabama, the Alabama Board of Corrections, and individual state officials. On appeal, this Court held:

> There *can be no doubt*, however, that the suit against the state and its board of corrections is barred by the Eleventh Amendment unless Alabama has consented to the filing of such suit. [Citation omitted] [Emphasis supplied].

The complaint does not allege and the record fails to disclose that the State of Mississippi has consented to this suit or waived its Eleventh Amendment immunity to suit in federal court.

Consequently, the district court correctly dismissed the Mississippi State Board of Health from the action.

II. The Action by the State Board of Health Deprived Petitioner of No Liberty or Property Interest.

The requirements of procedural due process apply only to the state deprivation of interests encompassed by the Fourteenth Amendment's protection of "liberty" and "property." *Board of Regents v. Roth, supra.*

Petitioner's claims are based upon the action of his employer in terminating his services and the alleged stigmatizing effect of the Board's order. Analysis of a property interest turns upon the existence of a legitimate

claim of entitlement to continued employment arising out of state law. The inquiry regarding a liberty interest focuses upon the nature of the decision of the State Board of Health.

A. Petitioner enjoyed no legitimate property interest in continued employment.

To have a property interest that is constitutionally protected by due process, petitioner must have had a legitimate claim of entitlement to continued employment arising out of state law. A unilateral expectation is insufficient. *Board of Regents v. Roth, supra.*

Petitioner alleges a property interest arising out of a private employment relationship. In particular, he asserts that he was to be "permanently employed" by Dr. Dyer as a physician assistant. Petitioner testified during his deposition that he had never entered into a written contract with Dyer nor was his employment for a fixed period. According to petitioner, the terms of his employment were that he was to continue to work so long as it was mutually agreeable. Under Mississippi law, "permanent employment" means employment terminable at the pleasure of either party. *Rape v. Mobile & Ohio R.R. Co.*, 136 Miss. 38, 100 So. 585 (1924); *Green v. Amerada Hess Corp.*, 612 F.2d 212 (5th Cir.), *rehearing en banc denied*, 614 F.2d 1298 (5th Cir. 1980).

It is plain that petitioner had no enforceable property interest or entitlement in continued employment with Dyer; rather, his employment was one terminable at the will of his employer. If he had no legitimate claim of entitlement to continued employment with his private employer, neither does he have any greater right in this action against defendants.

It is significant that the Board of Health would have been fully justified in enforcing the suspension of Dyer's

licen to practice medicine. Had it done so, petitioner would have lost his employment since his employer would have no longer required the service of an assistant. The fact that petitioner may have indirectly lost his employment would not have been sufficient to invoke the requirements of due process. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 65 L.Ed.2d 506, 100 S.Ct. 2467 (1980).

B. Petitioner was not deprived of a liberty interest protected by the due process clause of the Fourteenth Amendment.

Petitioner relies upon *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), for the proposition that he has liberty and property interests in holding specific private employment and following his chosen occupation free of unreasonable governmental interference. In that case, the Court recognized that specific employment may constitute a property interest and that the right to follow one's chosen occupation constitutes a liberty interest within the meaning of the Fifth Amendment. The Court, however, declined to rule on the constitutional claims, ruling instead on the question of authorization. Thus, petitioner, although he may allege he has a property right in specific employment, has no liberty interest in specific employment. See: *Board of Regents v. Roth, supra.*

Neither has petitioner been denied the opportunity to take advantage of other employment or to pursue his chosen occupation. The State Board of Health has taken no action against petitioner which would preclude him from other employment opportunities as a physician assistant. He remains free to pursue and accept employment with any other licensed physician in the state or elsewhere in the United States. See: *Cafeteria Workers v.*

McElroy, 367 U.S. 886, 895-896, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961).

Petitioner further contends that the finding entered by the Board with respect to Dyer has so stigmatized him in the community and his profession that he is effectively barred from following his chosen occupation.

Petitioner finally urges this court to review this case so that he may be afforded an opportunity to clear his name and continue his occupation.

In *Codd v. Velger*, 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977), this Court emphasized that the purpose of giving notice and a hearing in the context of a defamation liberty interest is to provide an individual with an "opportunity to clear his name." The Court further reasoned for a due process hearing to serve any useful purpose, there must be some factual dispute between the parties which has some significant bearing on the petitioner's reputation. (at p. 627). The Court concluded that notice and a hearing were necessary only where the employer (state) "creates and disseminates a *false and defamatory* impression" about an individual in connection with his employment termination.

Petitioner *sub judice* asserts that a dispute yet remains whether he was involved with Dyer in the unlicensed practice of medicine. While it is true that petitioner has denied in his complaint any "wrongdoing" (Petition for Certiorari, p. 9), he did admit during his deposition that it was Dr. Dyer's practice to give him a pad of pre-signed, but otherwise blank prescription forms which he used for prescribing drugs for patients he treated. (Deposition of Larry Abrams, pp. 43-44).

Section 73-25-33, Mississippi Code of 1972, provides:

"The practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person,

> any drug, medicine, appliance . . . for the cure, relief, or palliation of any ailment or disease of the mind or body . . . after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation . . . ."

Section 97-23-43, Mississippi Code of 1972, makes it a criminal offense for any person to "practice . . . as a physician or surgeon . . . without having first been examined and obtained a license as required by law."

Accordingly, there is no dispute regarding any statement or suggestion in the Board's order that petitioner was engaged in the unlicensed and, therefore, unlawful practice of medicine. See: *Codd v. Velger, supra.*

CONCLUSION

State defendants submit that petitioner, by his own admission, was engaged in the unlicensed practice of medicine as stated in the order of the Board of Health, and that no further purpose would be served by providing a hearing. Accordingly, state defendants urge that the Petition for Certiorari be denied.

Respectfully submitted,

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